Supreme Court, U.S.
FILED
JUN 17 1998
OFFICE OF THE CLERK

No. 97-1853

In The
Supreme Court of The United States
October Term 1997

STATE OF OHIO,
Petitioner,

v.

LAMONT L. HOLT,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Tenth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
With Appendix

Judith Stevenson
*David L. Strait
Franklin County Public Defender
373 South High Street
12th Floor
Columbus, Ohio 43215

(614) 462-3194
**Counsel of Record*

LEGAL ADVANTAGE - Appellate Service - (800) 581-2252
432 Walnut Street * Suite 200 * Cincinnati, OH 45202

63 pp

QUESTIONS PRESENTED FOR REVIEW

1. This Court is vested with jurisdiction to review a final judgment of a state court that presents a substantial constitutional question, but lacks jurisdiction to review judgments based upon independent, adequate state grounds. The judgment of the Ohio Court of Appeals challenged by Petitioner is based upon a decision of the Ohio Supreme Court that expressly applied Ohio constitutional law to prohibit warrantless searches of items seized from vehicles. Does this Court have jurisdiction to review this judgment?

2. A criminal defendant seeking suppression of items seized in a warrantless search must demonstrate the existence of a legitimate expectation of privacy in the

searched area. Testimony in the suppression hearing in the trial court indicated that Respondent possessed the searched item in his pocket immediately before the vehicle in which he rode was stopped by police. Does the fact-based ruling that Respondent had standing to challenge the search of this item warrant review by this Court?

LIST OF PARTIES

The Petitioner in this case is the State of Ohio. Lamont L. Holt is the Respondent. The case involves no other parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED. i

LIST OF PARTIES. ii

TABLE OF AUTHORITIES. vi

OPINIONS BELOW. 1

JURISDICTIONAL STATEMENT. 2

CONSTITUTIONAL PROVISIONS INVOLVED 5

STATEMENT OF THE CASE. 6

SUMMARY OF ARGUMENT. 10

ARGUMENT. 11

I. THIS COURT LACKS JURISDICTION TO REVIEW A STATE COURT JUDGMENT BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS 11

TABLE OF CONTENTS--CONT'D

II. A DEFENDANT SEEKING SUPPRESSION OF THE PRODUCT OF A WARRANTLESS SEARCH MAY ESTABLISH STANDING WITHOUT PERSONALLY TESTIFYING TO A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED 17

CONCLUSION 20

APPENDIX 22

APPENDIX A: Judgment Entry, Ohio Supreme Court (2/25/98)

APPENDIX B: Journal Entry, Ohio Court of Appeals (10/30/97)

APPENDIX C: Opinion, Ohio Court of Appeals (10/30/97)

APPENDIX D: Journal Entry, Ohio Court of Appeals (12/9/97)

TABLE OF CONTENTS--CONT'D

APPENDIX E: Memorandum Decision, Ohio Court of Appeals (12/9/97)

APPENDIX F: Excerpt of Transcript of Suppression Hearing (4/14/97)

APPENDIX G: Judgment Entry, Franklin County Court of Common Pleas (4/22/97)

TABLE OF AUTHORITIES

CASES

Berea College v. Kentucky,
211 U.S. 45 (1908). 3

California v. Greenwood ,
486 U.S. 35 (1988). 16

Chimel v. California,
395 U.S. 752 (1969). 15

City of Athens v. Wolf,
38 Ohio St.2d 237,
313 N.E.2d 405 (1974). 19

City of Xenia v. Wallace,
37 Ohio St.3d 216, 524 N.E.2d 889 (1988). 19

Herb v. Pitcarin,
324 U.S. 117 (1945). 17

New York v. Belton ,
453 U.S. 454 (1981). 12, 15

Rakas v. Illinois,
439 U.S. 128 (1978). 17, 19, 20, 21

TABLE OF AUTHORITIES--CONT'D

Simmons v. United States,
390 U.S. 377 (1968). 18

State v. Brown,
63 Ohio St.3d 349, 588 N.E.2d 113,
cert. denied, 506 U.S. 862 (1992). . . 3 , 11, 12,
14, 16

State v. Holt,
81 Ohio St.3d 1453,
690 N.E.2d 547 (1998). 2, 9

Zacchini v. Scripps-Howard Broadcasting Co. ,
433 U.S. 562 (1977). 3

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution. . . 5,13

Fourteenth Amendment, United States Constitution 5

§14, Article I, Ohio Constitution. 3, 6, 13, 16

STATUTES/RULES

28 U.S.C. §1257. 2

TABLE OF AUTHORITIES--CONT'D

Rule 10, United States Supreme Court Rules of Practice. 20

No. 97-1853

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

STATE OF OHIO,
Petitioner

-vs-

LAMONT L. HOLT,
Respondent.

On Petition for Writ of Certiorari to
the Ohio Court of Appeals, Tenth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Order of the Franklin County Court of Common Pleas which sustained Respondent's motion to suppress is

not reported, but is attached to this Brief as **Appendix G.** The Opinion of the Court of Appeals of Ohio, Tenth Appellate District, is also unreported, but is attached as **Appendix C**. The Order of the Ohio Supreme Court denying discretionary review is reported at 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998), and is also attached as **Appendix A**.

JURISDICTIONAL STATEMENT

Petitioner claims jurisdiction pursuant to 28 U.S.C. §1257. This section vests this Court with jurisdiction to review a final judgment of a state court that presents a substantial federal question. Jurisdiction does not extend to review of

state court judgments based upon independent and adequate state grounds, however.[1]

Review of the challenged Opinion of the Court of Appeals reveals that the Court premised its ruling largely upon a prior opinion of the Ohio Supreme Court[2] that was expressly based upon a provision of the Ohio Constitution[3] that governs police searches and seizures.

Respondent submits that the judgment at issue is based upon independent and adequate state grounds. This

---

[1] See *Zacchini v. Scripps-Howard Broadcasting Co.* , 433 U.S. 562, 566 (1977); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

[2] *State v. Brown*, 63 Ohio St.3d 349, 588 N.E.2d 113, cert. denied, 506 U.S. 862 (1992).

[3] §14, Article I, Ohio Constitution.

Honorable Court therefore lacks jurisdiction to review this judgment.

Respondent addresses this issue in detail in the Argument below.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment provides, *inter alia*:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * *

§14, Article I of the Ohio Constitution states:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

STATEMENT OF THE CASE

Respondent Lamont Holt was charged with possession of crack cocaine in violation of Ohio statutes. The charge arose from the routine traffic stop of an automobile in which Respondent was a passenger. Prior to trial, Respondent moved to suppress evidence of the

cocaine as fruits of an illegal and warrantless search in violation of his constitutional rights.

During a hearing on the suppression motion, Columbus, Ohio police officer Todd S. Rhodeback testified that he stopped an automobile for speeding in the early morning hours of February 10, 1997.[4] Rhodeback saw three people in the vehicle: the driver, a front seat passenger, and a single rear seat passenger. He saw the person in the rear moving around, and dipping his torso forward as if to be hiding something. He stated that he could only see this person from the shoulders up, but that the forward motion of the person gave him concern for his own safety. Rhodeback stated that Respondent was

---

[4] The evidence adduced in the suppression hearing is well summarized in the opinion of the Court of Appeals, attached as Appendix C.

fidgeting around, and appeared to be digging into his pockets.

After the stop, a second officer, Clinton Smith, removed Respondent from the car, and patted him down to check for weapons. Finding none, he placed Respondent in the rear of a cruiser.

After police removed the other occupants of the vehicle and placed them in separate cruisers, Rhodeback returned to the cruiser to look under the seat. He found a white knit glove, felt it had something inside it, then looked inside and found what appeared to be crack cocaine in the baggy Rhodeback conceded that the glove itself was not a weapon or threat to him, and that prior to searching the glove, he had no idea what its contents were.

The trial court sustained the motion to suppress. Petitioner appealed to the Ohio Court of Appeals, Tenth Appellate District. By Opinion and Judgment Entry rendered October 30, 1997, the court affirmed the trial court. The court denied Petitioner's subsequent motion for reconsideration on December 9, 1997.

Petitioner appealed to the Ohio Supreme Court. By Entry filed February 25, 1998, the Supreme Court denied review.[5]

---

[5] *State v. Holt*, 81 Ohio St.3d 1453, 690 N.E.2d 547 (1998).

SUMMARY OF ARGUMENT

The petition of the State of Ohio should be rejected for two independent reasons. First, Petitioner challenges the judgment of the Court of Appeals of Ohio, Tenth Appellate District, and claims that the court erred in its application of federal constitutional law. But the opinion of the Court of Appeals based its decision almost exclusively on a decision of the Ohio Supreme Court that was based on *state* constitutional law. Thus, the judgment in question is based upon independent, adequate state grounds. This Court lacks jurisdiction over the case.

Second, review of the challenged opinion reveals that the state court correctly referred to decisions of this Court on the issue of an accused's standing to assert a Fourth Amendment violation. Petitioner's argument is little

more than a disagreement with the factual conclusions reached in the state courts. The case, then, does not present a constitutional issue of sufficient magnitude to warrant this Court to exercise its jurisdiction.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION TO REVIEW A STATE COURT JUDGMENT BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

In its Opinion, the Court of Appeals relied heavily on the prior opinion of the Ohio Supreme Court in *State v. Brown*:

In *State v. Brown* (1992), 63 Ohio St. 3d 349, 588 N.E.2d 113, the issue presented was whether the warrantless search of the defendant's automobile was justified under the line of cases that permits an officer to conduct a warrantless search incident to a lawful custodial arrest " in order to protect himself from any accessible weapons." *Id.* at 350. The Supreme Court of Ohio held, at the syllabus:

"A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect -- and sole occupant of the vehicle -- under control in the police cruiser. (*New York v.*

Belton [1981], 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 ***, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)"

We believe the same rationale applies here. Based upon the foregoing case law and the evidence delineated above, the police officer had no right to search the glove. According to testimony adduced at the hearing, when the officer picked up the glove, innocuous in and of itself, it became readily apparent that it did not contain a weapon. There was simply no evidence to suggest what the glove's contents, if any, appeared to be. By the officer's own admission, he had no idea what might be contained in the glove.

> He could not and did not contend that he felt "threatened" in any way by the glove or its contents. Pursuant to the rule and rationale of *Brown*, the right to search the glove stopped once the officer was aware no weapons were present. Any ensuing searches and seizures were unlawful.

(Emphasis added.)

This analysis was a correct application of *State v. Brown*, and a proper construction of Ohio Constitutional law. *Brown* presented the question of whether a warrantless search of closed containers found in a vehicle could occur once the occupant had been arrested and secured in a police cruiser. The State contended that the search was authorized

by prior rulings of this Court governing searches incident to arrest.[6]

Significantly, the Ohio Supreme Court expressly declined to follow this Court's prior ruling in *New York v. Belton*:

> "If *Belton* does stand for the proposition that a police officer may conduct a detailed search of an automobile solely because he has arrested one of its occupants, on any charge, we decline to adopt its rule."

In so stating, the Court expressly relied upon the Ohio Constitution and noted that greater rights may be

---

[6] *New York v. Belton*, 453 U.S. 454 (1981); *Chimel v. California* , 395 U.S. 752 (1969).

afforded by the constitutions of individual states than under the federal Constitution.[7]

§14, Article I of the Ohio Constitution, as construed in *State v. Brown*, serves as a state ground that is both independent and adequate. The decision of the trial court is fully supportable on this state ground even if, *arguendo*, the court erred in its application of federal law. Review, then, would constitute little more than an advisory opinion on any

---

[7] *State v. Brown* at fn. 3, citing *California v. Greenwood* , 486 U.S. 35, 43 (1988): "Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."

federal question. This Court should therefore decline jurisdiction.[8]

II.

A DEFENDANT SEEKING SUPPRESSION OF THE PRODUCT OF A WARRANTLESS SEARCH MAY ESTABLISH STANDING WITHOUT PERSONALLY TESTIFYING TO A LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

The proposition that a criminal defendant seeking suppression must have a legitimate expectation of privacy in the area searched is long-settled.[9] Petitioner seemingly urges the Court to extend this rule to require a defendant to

---

[8] *Herb v. Pitcarin*, 324 U.S. 117, 125 (1945).

[9] *Rakas v. Illinois*, 439 U.S. 128 (1978).

testify as to this expectation of privacy in order to establish standing.

The risks that this unwarranted modification of law would pose to criminal defendants are patent. While it is clear that statements made by an accused during a suppression hearing are not admissible in the prosecution's case in chief[10], this Court has never held that such statements may not be used during cross-examination of the accused, or in sentencing. Nothing in current law requires an accused seeking suppression to submit to such risks.

[10] *Simmons v. United States*, 390 U.S. 377. (1968).

Consistent with Ohio law governing suppression proceedings involving warrantless searches,[11] the Petitioner bore the burden of establishing that the search fit a recognized exception to the warrant requirement. *The state's own evidence* suggested if not established that Respondent possessed the glove. The Court of Appeals correctly found that "police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the glove from his pocket prior to depositing it on the floor under the seat in front of him."

It is in this respect that this case and *Rakas v. Illinois* differ strikingly. *Rakas* involved an effort by vehicle

---

[11] *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988); *City of Athens v. Wolf*, 38 Ohio St.2d 237, 313 N.E.2d 405 (1974).

passengers to suppress evidence--a box of rifle shells and a sawed-off shotgun used in a robbery. *No evidence* showed that the passengers owned either the items or the vehicle.

The holding of the Court of Appeals below represents a correct interpretation of facts and application of the *Rakas* rule. Petitioner has simply not demonstrated error--or a compelling need for this Court to revisit and modify settled law.

CONCLUSION

The admonition and observation set forth in this Court's Rules are clear: a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.[12] In the final analysis, Petitioner's claim is

---

[12] Rule 10, Supreme Court Rules of Practice.

simply that the Court of Appeals either erred in its factual findings or misapplied the settled rule of *Rakas v. Illinois*. Petitioner, then, has failed to set forth the existence of a federal constitutional question, or a compelling reason why this Court should exercise jurisdiction here. Accordingly, this Court should deny certiorari and decline review of the Court of Appeals.

Respectfully submitted,

Judith Stevenson
Franklin County Public Defender

David L. Strait (Counsel of Record)
373 South High Street, 12th Floor
Columbus, Ohio 43215
614-462-3194

Counsel for Respondent

Table of Appendix Contents

Judgement Entry, Ohio Supreme Court,
filed 2/25/98 . . . . . A1-A1

Journal Entry, Ohio Court of Appeals,
filed 10/30/97 . . . . . B1-B1

Opinion, Ohio Court of Appeals,
filed 10/30/97 . . . . . C1-C16

Journal Entry, Ohio Court of Appeals,
filed 12/9/97 . . . . . D1-D1

Memorandum Decision, Ohio Court of Appeals,
filed 12/9/97 . . . . . E1-E2

Excerpt of Transcript of Suppression Hearing,
Franklin County Court of Common Pleas,
filed 4/14/97 . . . . . F1-F2

Judgement Entry, Franklin County Court of
Common Pleas,
filed 4/22/97 . . . . . G1-G1

APPENDIX A

UNITED STATES SUPREME COURT OF OHIO

JUDGEMENT ENTRY

Tenth Circuit Case Nº. 97-1853
Filed February 25, 1998

Pages A-1 thru A-1

APPENDIX A

THE SUPREME COURT OF OHIO

State of Ohio,
Appellant,

[filed Feb. 25, 1998]
1998 TERM

v.

Case No. 97-2581

Lamont L. Holt,
Appellee.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:
Docket Fee, $40.00, paid by Ron O'Brien
(Franklin County Court of Appeals; No. 97APA04550)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOURNAL ENTRY

Tenth Circuit Case Nº. 97-1853
Filed October 30, 1997

Pages B-1 thru B-1

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

[filed Oct. 30, 1997]

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on October 30, 1997, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OPINION

Tenth Circuit Case Nº. 97-1853
Filed October 30, 1997

Pages C-1 thru C-16

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

OPINION

Rendered on October 30, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellant.

H. Tim Merkle, for appellee.

APPEAL from the Franklin Cnty Court of Common Pleas

TYACK, P.J.

On February 29, 1997, Lamont L. Holt was indicted by a Franklin County grand jury on a single count of possession of cocaine, in violation of R.C. 2925.11, a felony of the second degree. The charge resulted from a routine traffic stop of a car in which Mr. Holt was a passenger. The pertinent factual details are set forth below in our discussion of the assignments of error.

On March 17, 1997, defense counsel filed a motion seeking suppression as evidence the cocaine and any other items unlawfully searched and/or seized as fruits of an "illegal and warrantless seizure of the defendant." Following a hearing which commenced on April 15, 1997, the trial court sustained the motion to suppress.

The state of Ohio timely filed its notice of appeal, pursuant to R.C.2945.67, Crim.R. 12(J), and App.R. 4(B)(4). The state sets forth two assignments of error for our consideration:

"FIRST ASSIGNMENT OF ERROR

"THE TRIAL [COURT] ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN NO ILLEGAL SEARCH OR SEIZURE OCCURRED.

"SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN SUPPRESSING THE CRACK COCAINE, WHEN THE CRACK COCAINE WAS NOT COME AT BY EXPLOITATION OF THE ILLEGAL 'ARREST.'"

Because the assignments of error are interrelated, we address them jointly.

The trial court's ruling was based upon the following evidence adduced at the hearing on the motion to suppress.

The first witness called to testify on behalf of the state was Todd S. Rhodeback, who had been employed as a Columbus police officer for approximately two and one-half years at the time. On the date of the incident, Officer Rhodeback was working third shift, 10:00 p.m. to 6:00 a.m. (Tr. 19-21.)

At approximately 1:15 a.m. on February 10, 1997, Officer Rhodeback was "running the radar" and clocked a vehicle travelling 48 in a 35 miles-per-hour zone. Another officer, Clint Smith, was also there in his own cruiser. Officer Rhodeback pulled up behind the vehicle to initiate a traffic stop. Officer Smith also followed in his cruiser and stopped his cruiser behind Rhodeback's. The driver of the private vehicle promptly pulled over and was "cooperative." (Tr. 22-26.) Soon thereafter, a third cruiser stopped as well.

Officer Rhodeback observed three persons in the vehicle: the driver, a passenger in the front, and a passenger in the back seat. Officer Rhodeback observed the person seated in the back "*** moving around. As I was getting out of the cruiser, he was dipping his torso forward as if to be hiding something." The officer conceded that from his vantage point in his cruiser behind the car, he could only see this person from "shoulders up." According to the officer, the "bending forward" motion of the back seat passenger "most definitely" gave him cause for concern for his personal safety. In particular, he noted that there might have been a weapon in the back seat. (Tr. 27-31.)

After Officer Rhodeback informed Officer Smith of his safety concerns, Smith removed Mr. Holt, the back seat passenger, from the car. Smith then patted him down to check for weapons and put him in a cruiser. No weapons were found. (Tr. 32-34.)

At some point, the driver and remaining passenger were also taken out of the car and placed in separate cruisers. With respect to finding a glove in the vehicle, Officer Rhodeback testified as follows:

> "A. If I recall, that's when we -- when I go in the back to find -- to look under the seat to where the alleged area the person was hiding something, look under the [front passenger] seat and find a white *** knit glove, felt it had something inside it, then

when it's -- when I looked inside and find what appears to be crack cocaine in the baggy." (Tr. 34.)

Officer Rhodeback clarified that the cocaine was found in the "main part of the glove," in the "middle," as opposed to the finger holes. (Tr. 39-40.) On cross-examination, the officer provided further details with respect to his observations regarding the glove:

"[Defense counsel] Q. Okay. So you knew the glove wasn't a weapon?

"[Officer Rhodeback] A. No. The glove itself, yes, I knew wasn't a weapon.

"Q. What about the way that it appeared to you made you think that it was a threat to you?

"A. The way that that appeared to me there is something inside.

"Q. Okay.

"A. *The content of which I have no idea.* That's why I checked and saw what was in there.

"Q. You didn't feel it or anything to try to figure out what was inside?

"A. Pulled it out and looked, shined the flashlight in.

"Q. Well, did you suspect that what was inside of it was a gun?

"A. *No.*

"Q. Did you suspect that what was inside of it was a knife?

"A. *To be honest, I didn't suspect what was in it, that's why I looked.*" (Tr. 75-76; emphasis added.)

An officer conducted a field test of the substance, which tested positive for cocaine. (Tr. 39-40.) Soon thereafter, Mr. Holt was placed under arrest.[1]

Officer Rhodeback testified that he left the glove in the vehicle instead of turning it over to the property room along with the cocaine. When asked why he decided to leave the glove in the car, he responded, "Well, to me [it] was not considered evidence. It wasn't -- I don't know, it just wasn't part of the crime in my opinion." (Tr. 46.)

On cross-examination, Officer Rhodeback clarified that, as he pulled in behind the vehicle which had promptly pulled over, he was adjusting the cruiser's spotlight. At that time, all he saw to arouse his suspicion was Mr. Holt's upper body movement, primarily his shoulders. Soon thereafter, when the officer approached the vehicle, he saw the back seat passenger "bend forward."

---

[1]According to the record, the driver of the car was issued a citation for speeding and the other passenger was arrested based upon outstanding warrants.

The officer conceded that he was not able to see Mr. Holt's arms or hands; all he saw was a "forward movement." (Tr. 57-58.)

According to Officer Rhodeback, Mr. Holt told the officer that "they weren't his drugs." Mr. Holt made no other statement. (Tr. 82.) On redirect examination, the officer again clarified that the glove was "more in the reach of the person in the rear." (Tr. 85.)

Significantly, the record does not indicate that any questions were asked at any time regarding ownership of the glove itself.

Officer Clinton A. Smith testified that he had been a patrol officer for almost three years. He was in a separate cruiser "doing speed patrol' at the same location and time Officer Rhodeback was patrolling. When Rhodeback followed and pulled over the vehicle, Smith followed and parked his cruiser behind Rhodeback's. (Tr. 88-89.) Officer Smith's testimony regarding the traffic stop includes the following:

> "A. As I approached the car from the passenger side, I came up on the passenger side and Officer Rhodeback stated,[']did you see him moving?['] At which time - well, prior to that I observed the rear passenger making some gesture forward and making some motions that appeared to me that he was attempting to hide or do

something of an inappropriate nature." (Tr. 89.)

He later described the "gesture" as "making a bending movement at the mid torso, *** a reaching down and a movement of that nature." (Tr. 91.) Officer Smith further explained:

> "I could not see his actual hands or anything of that nature, but it was clear that he was leaning forward and extending himself out toward the front seat." (Tr. 93.)

Officer Smith then asked Mr. Holt to exit the vehicle, and Mr. Holt cooperated. Smith patted him down and placed him in the back seat of his cruiser. Another patrolman, Officer Wood, soon arrived on the scene and assisted Officer Rhodeback in ordering the others to exit the vehicle. (Tr. 95-96.) On cross-examination, Officer Smith conceded that the "leaning forward" motion was consistent with the rear passenger speaking to those in the front seat.

On cross-examination, Officer Smith explained why he believes that "leaning forward" is a sufficient reason to take someone out of a car:

> "A. Well, in the particular area of town we work it's very common to find narcotics or firearms, and when an individual moves in a manner which you're unable to see what they're doing and it's clear -- not actually clear, but they may be attempting to hide

something, we normally remove him from the car." (Tr. 99.)

Smith conceded that it is not "typical" for three cruisers to respond to a lone vehicle allegedly travelling faster than the posted speed limit. (Tr. 100.)

Defense counsel noting that there were three male black occupants in the car, Officer Smith responded that part of the reason he decided to "assist" was because there were "three individuals." When asked by defense counsel if the officer would have decided to "assist" if the occupants were a man, a woman and a child, the officer responded, "probably not." However, if it had been three women, he "probably would have just for officer safety reasons." (Tr. 101-102.)

Following brief arguments of counsel, the trial court promptly sustained Mr. Holt's motion to suppress. The trial court stated the following as its rationale:

> "THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way -- way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that. This gentleman *[sic]*, based upon the totality of evidence I heard from both these

officers, I feel that the search was beyond -- was beyond the scope.

"[PROSECUTION]: Beyond the scope of what?

"THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

"[PROSECUTION]: Your Honor, is the Court stating, then, that the — this evidence would then be suppressed under fruit of the poisonous tree?

"THE COURT: Exactly what I'm saying." (Tr. 118-119.)

While the trial court's rationale in suppressing the evidence is not a model of clarity, the court apparently concluded that the actions of law enforcement personnel in their various searches and seizures which occurred here were unreasonable and improper based upon the "totality of the circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177. In *Bobo,* the Supreme Court of Ohio held, at paragraph two of the syllabus, as follows:

"Where a police officer, during an investigative stop, has a *reasonable suspicion that an individual is armed based on the totality of the circumstances,* the officer may

initiate a protective search for the safety of himself and others." (Emphasis added.)

Neither party contends that the initial traffic stop was unlawful nor otherwise impermissible. Similarly, since Mr. Holt claims no ownership interest in the car, no argument is made that he has standing to challenge the arguably questionable search of the car. Thus, our analysis proceeds first to the warrantless search and seizure of Mr. Holt himself.

Preliminarily, as a threshold issue, we note a significant case rendered recently by the Supreme Court of the United States which compels us to find initially that appellant has no Fourth Amendment complaint as to his being ordered out of the car in the first place. In *Maryland v. Wilson* (1997), 519 U.S. __, 117 S. Ct. 882, the Supreme Court held that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop. The *Wilson* case expressly expanded the scope of *Pennsylvania v. Mimms* (1977), 434 U.S. 106, wherein the Court ruled that an officer may, as a matter of course, order the *driver* of a lawfully stopped car to exit the vehicle. In essence, the ultimate conclusion of both *Wilson* and *Mimms* was that considerations of "officer safety" outweigh the intrusion into a "*** driver's [or passenger's] liberty occasioned by the officer's ordering him out of the car." *Wilson* at 885. Thus, under the federal Constitution,

appellant clearly cannot complain about being asked to get out of the car.

The Supreme Court of Ohio has followed and applied the *Mimms* rule which "merely dispenses with the requirement that the police officer possess reasonable suspicion of criminal activity before the officer may order the *driver* out of an already lawfully stopped vehicle." (Emphasis added.) *State v. Evans* (1993), 67 Ohio St.3d 405, 408. As noted by the *Evans* court, a "*Mimms* order does not have to be justified by any constitutional quantum of suspicion." *Id.*

We note that other Ohio appellate courts have recently relied upon *Wilson* to sanction law enforcement orders requiring all occupants to exit a lawfully stopped vehicle. See, *e.g., State v. Birchfield* (Aug. 26, 1997), Ross App. No. 97CA2281, unreported (Fourth Appellate District); *State v. Fellows* (May 22, 1997), Cuyahoga App. No. 70900, unreported (Eighth Appellate District); *State v. Hamilton* (Aug. 1, 1997), Montgomery App. No. 16124, unreported, and *State v. Ross* (Aug. 29, 1997), Montgomery App. No. 16135, unreported (Second Appellate District).

Assuming, *arguendo,* that no state constitutional right was violated by law enforcement officials in ordering all occupants out of the car, we proceed in our analysis to the search and seizure of Mr. Holt's person.

With respect to the propriety of the "pat-down" search of Mr. Holt, we first look to *Terry v. Ohio* (1968), 392 U.S. 1. As construed by the Supreme Court of Ohio, the United States Supreme Court's holding in *Terry* allows law enforcement to conduct a "limited protective search of the detainee's person for concealed weapons" only when justified by an officer's reasonable conclusion that "'the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others***. *Evans, supra* at 408, citing *Terry* at 24. In justifying that conclusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 21. The circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Freeman* (1980), 64 Ohio St.2d 291, 295. Thus, the standard for reviewing such police conduct is an objective one. *Terry, supra,* 392 U.S. at 2 1-22; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

Given the state of the record before us and the *Terry* progeny bestowing increasing degrees of deference to an officer's professed objectives for conducting "protective" frisks, we cannot say that the pat-down search of Mr. Holt was unconstitutionally impermissible.

Finally, we now turn to that issue which we deem dispositive of this appeal: whether the defendant has standing to complain about the search of the glove itself, about which search the prosecution urges us to find that Mr. Holt lacks standing to complain.

Suppression of the fruit of a Fourth Amendment violation can be urged only by those whose rights were violated by the search itself. Standing is not achieved solely by a person's status as defendant nor by introduction of damaging evidence. *Alderman v. United States* (1969), 394 U.S. 165. Therefore, before a court may review the reasonableness of police behavior, the defendant must demonstrate that his Fourth Amendment right to privacy was violated. "Fourth Amendment rights are personal rights which *** may not be vicariously asserted." *Rakas v. Illinois* (1978), 439 U.S. 128, 133-134. To establish that his own Fourth Amendment rights have been violated by an illegal search and seizure, a defendant has the burden to demonstrate that he or she has a reasonable expectation of privacy in the area searched. *Id.*

As indicated above in our discussion of the facts of this case, no direct evidence was introduced regarding ownership of the glove itself. However, the state's entire theory upon which it bases its prosecution is that the glove, or at least the contents thereof, belonged to Mr. Holt. Further, police testimony at the hearing indicated the belief of police personnel that Mr. Holt removed the

glove from his pocket prior to depositing it on the floor under the seat in front of him. Therefore, we find that he does have standing to challenge the search of the glove.

In *State v. Brown* (1992), 63 Ohio St.3d 349, the issue presented was whether the warrantless search of the defendant's automobile was justified under the line of cases that permits an officer to conduct a warrantless search incident to a lawful custodial arrest *"in order to protect himself from any accessible weapons." Id.* at 350. The Supreme Court of Ohio held, at the syllabus:

> "A police officer may not open a small, closed container found inside an automobile's glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect -- and sole occupant of the vehicle -- under control in the police cruiser. *(New York v. Belton* [1981], 453 U.S. 454, ***, distinguished; the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, applied.)"

We believe the same rationale applies here. Based upon the foregoing case law and the evidence delineated above, the police officer had no right to search the glove. According to testimony adduced at the hearing, when the officer picked up the glove, innocuous in and of

itself, it became readily apparent that it did not contain a weapon. There was simply no evidence to suggest what the glove's contents, if any, *appeared* to be. By the officer's own admission, he had no idea what might be contained in the glove. Be could not and did not contend that he felt "threatened" in any way by the glove or its contents. Pursuant to the rule and rationale of *Brown,* the right to search the glove stopped once the officer was aware no weapons were present. Any ensuing searches and seizures were unlawful.

As a result, the assignments of error are overruled.

Having overruled the assignments of error, the judgment of the trial court is affirmed.

Judgment affirmed.

CLOSE and PETREE, JJ., concur.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOURNAL ENTRY

Tenth Circuit Case Nº. 97-1853
Filed December 9, 1997

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, [filed Dec. 9, 1997]

Plaintiff-Appellant,

v. No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,

Defendant-Appellee.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on December 9, 1997, it is the order of this court that the application for reconsideration is denied.

TYACK, P.J., CLOSE & PETREE, JJ.

By /s/ G. Gary Tyack
Judge G. Gary Tyack

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEMORANDUM DECISION

Tenth Circuit Case Nº. 97-1853
Filed December 9, 1997

Pages E-1 thru E-2

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellant,

v.

No. 97APA04-550
(Regular Calendar)

Lamont L. Holt,
Defendant-Appellee.

MEMORANDUM DECISION

Rendered on December 9, 1997

Ronald J. O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellant.

H. Tim Merkle, for appellee.

ON APPLICATION FOR RECONSIDERATION

TYACK, P.J.

This cause is before the court as the result of the filing of a document entitled "motion for reconsideration" on behalf of the state of Ohio.

The evidence presented at the hearing on the motion to suppress indicated that the glove in question was on the floor under the seat in front of Lamont Holt when the vehicle in which he was riding was pulled over. No evidence was presented which indicated that the glove was not his. No warrants of any kind were involved in the case. The state of Ohio did not demonstrate any lack of standing either in the trial court or on appeal. Given the absence of any warrants, the state of Ohio had the duty to go forward with evidence of a lack of standing for Lamont Holt if the state wished to avoid the consequences of the illegal search conducted.

Treated as an application for reconsideration, pursuant to App.R. 26(A), the "motion" is denied.

Application denied.

CLOSE and PETREE, JJ., concur.

APPENDIX F

FRANKLIN COUNTY, OHIO
COURT OF COMMON PLEAS
CRIMINAL DIVISION

EXCERPT OF TRANSCRIPT OF
SUPPRESSION HEARING

Tenth Circuit Case №. 97-1853
Filed April 14, 1997

Pages F-1 thru F-2

APPENDIX F

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff

vs. Case No. 97CR-02-882

LAMONT Holt,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before Honorable Judge David Fais

***

[Transcript pages 118 and 119—April 15, 1997]

THE COURT: *** Motion is sustained. Motion is sustained.

MR. MERKLE [defense-counsel]: Thank you, Your Honor.

MR. WODARCYK [prosecutor]: Your Honor, may the Court make a record of its reasons for the sustaining of the motion?

THE COURT: Because I believe at this point the Defendant was under arrest, and I believe at that time the search went way — way beyond -- way beyond the window of province of what the officer knew at that particular time. I think it went way beyond that point. I

think it went way beyond that. This gentleman, based upon the totality of evidence I heard from both these officers, I feel that the search was beyond — was beyond the scope.

MR. WODARCYK: Beyond the scope of what?

THE COURT: Beyond the scope as far as -- as far as when this man was detained. When this man was detained, the officer went further, and they had no basis to go further -- any further than that.

MR. WODARCYK: Your honor, is the Court stating, then, that the -- this evidence would then be suppressed under fruit of the poisonous tree?

THE COURT: Exactly what I'm saying.

* * *

APPENDIX G

FRANKLIN COUNTY, OHIO
COURT OF COMMON PLEAS
CRIMINAL DIVISION

JUDGEMENT ENTRY

Tenth Circuit Case Nº. 97-1853
Filed April 22, 1997

APPENDIX G

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,
Plaintiff,

[filed Apr. 22, 1997]

vs.

Case No. 97CR-02-882

Lamont Holt,
Defendant.

Judge Fais

ENTRY

For the reasons stated on the record on April 15, 1997, the Court hereby SUSTAINS the motion to suppress filed by defendant.

/s/ Fais 4-22-97
Judge David W. Fais
Franklin County Court of
Common Pleas

APPROVED:

/s/ Steven L. Taylor (as to form only)
STEVEN L. TAYLOR (0043876)
Assistant Prosecuting Attorney

/s/ H. Tim Merkle (by SLT per phone authority)
H. TIM MERKLE (0023458)
Counsel for Defendant